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No. 02-882

IN THE

Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,

v.

MILTON RISEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondent's entire brief in opposition is based on the false premise that the jury "found full liability" on his contractual claims for three separate bonuses, even if it then "awarded damages that exceeded the maximum available in light of the record." Br. in Opp. 11. As the petition makes clear, however, it is simply impossible to know from the record, and in particular the verdict form, just what the jury found with respect to Advanta's liability for each bonus. *See* Pet. 8-9. That critical circumstance makes all respondent's arguments inapposite, and leaves him with no answer to our showing that the decision below cannot be reconciled with the Seventh Amendment.

1. We do not contend that there must be a new trial "anytime a jury verdict is found to exceed the maximum amount of damages supported by the record or available un-

der law." Br. in Opp. 6; *see id.* at 13. A court may properly use remittitur to correct an excessive verdict, *if* the precise effect of an error is clearly ascertainable from something in the record, such as a detailed special verdict form. *See* Pet. 6, 11. Remittitur may also be used where the jury erred by awarding too much for some item of damages, such as pain and suffering, that is necessarily uncertain as to amount, and the court's order merely "lop[s] off an excrescence." *See* Pet. 6-7 (quoting *Dimick* v. *Scheidt*, 293 U.S. 474, 486 (1935)); *see also* Pet. 11-12 (discussing *Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir. 1984), and the treatment of "intrinsically excessive" damages).[1] In such circumstances, the *plaintiff's* right to a jury trial is normally preserved through an option to refuse the reduced award and demand a new trial. The *defendant's* right to a jury is not infringed, so long as each part of the verdict that survives, as to both liability and damages, is still supported by specific findings that are known from, or necessarily implied by, the jury's original verdict. *See Dimick*, 293 U.S. at 486; *Marchant*, 836 F.2d at 704.

The situation is different where a reviewing court must correct an excessive verdict, but the verdict form or other circumstances make it impossible to know which of several possible liability findings, leading to significantly different damages, the jury actually made. In such a case, the defen-

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[1] Respondent relies principally on cases of the second type. *See, e.g.*, *Marchant* v. *Dayton Tire & Rubber Co.*, 836 F.2d 695, 703-04 (1st Cir. 1988) (reducing award for pain and suffering); *Earl* v. *Bouchard Transp. Co.*, 917 F.2d 1320, 1327-30 (2d Cir. 1990) (sustaining reduction of award of general damages); *Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778, 783-86 (5th Cir. 1983) (ordering remittitur based on excessive awards for loss of companionship). As discussed below (*see* pp. 4-5, *infra*), the claim that there is no conflict in the circuits ignores the difference between such cases and a case like this one (and like *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976)), in which revision of the jury's damage award requires speculation as to its findings with respect to liability.

dant is aggrieved by a judicial decision that presumes the liability findings most favorable to the plaintiff.[2]

As the petition explains, that is precisely what happened in this case. *See* Pet. 5, 8-9. Respondent claimed a contractual entitlement to three separate bonuses—two fixed in amount, one variable but capped. His lawyer's closing argument ignored the cap on the third bonus, and invited the jury to make a very large award on the basis of that bonus alone. *See* Pet. 3. The jury returned a general verdict for an amount greater than respondent could properly have received even if he had received the maximum amount for all three bonuses. That award clearly reflected jury error of some sort, and could not be sustained. *See* Pet. App. 8a-9a. Contrary to respondent's submission (Br. in Opp. 11), however, nothing in the verdict shows that the jury "found full liability" on respondent's claims under the WPCL. Rather, as the petition makes clear, *see* Pet. 8-9, there is simply no way to tell with certainty just how the jury erred in computing damages, or what it found as to Advanta's contractual liability to respondent on any particular one of the three bonuses. Respondent's telling inability to refute our demonstration that there are a number of hypothetical liability findings consistent with the verdict form in this case (*see id.*) confirms that the court of appeals was simply speculating when it reached the pivotal conclusion (Pet. App. 9a) that it was "persuaded by the record" that "all three bonuses" were included in the jury's damage award under the WPCL.

Respondent cannot avoid review by mischaracterizing our argument. It is obviously not true, for example, that

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[2] If anything the rule would have to be the converse: To avoid giving the defendant the right to demand a new trial, the court would have to reduce the award to reflect "*the maximum [possible] effect of the error*." *See Liberty Mutual Ins. Co.* v. *Continental Casualty Co.*, 771 F.2d 579, 588 (1st Cir. 1985) (quoting 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 59.08[7], at 59-208-210) (footnotes omitted and emphasis added by the court)).

"every time a jury awards damages in excess of a statutory cap, . . . a new trial would be warranted." Br. in Opp. 13. In *this* case, however, although some error resulting in excessive damages is obvious on the face of the verdict, the precise nature of the error cannot be surely ascertained and corrected. Any reduced award must instead rest on judicial speculation as the jury's exact conclusions regarding liability. Under those circumstances, the Seventh Amendment gives the defendant the right to a new trial.

2. For the same reasons, respondent fails in his attempt to distinguish this case from *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir.), *reh'g denied*, 530 F.2d 34 (1976). *See* Br. in Opp. 7. As respondent notes (*id.*), the court below concluded that the record contained sufficient evidence to support a jury finding of liability as to each bonus. *See* Pet. App. 7a.[3] The Seventh Amendment question is not, however, what recovery a court might conclude was "supported by the evidence." Br. in Opp. 7. The question is what liability findings are actually established by the jury's verdict. The court below never pointed to anything in the record establishing that the jury in this case found liability as to each bonus. To the contrary, when that question become relevant for purposes of correcting the jury's damage award, the court only declared itself "persuaded by the record" that such findings were what the jury had in mind. *Id.* at 9a. That declaration involves precisely the sort of judicial speculation rejected by *Jamison*. *See* 530 F.2d at 34 (order denying rehearing) (new trial required where it is impossible "to determine the theory of liability on which the jury premised its overly generous verdict").

Respondent's discussion of the Second Circuit's decision in *Lin* (Br. in Opp. 7-8) embodies a similar error. It is incorrect to say (*id.*) that "[t]he purported [jury] error in this

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[3] The court reached that conclusion in the course of rejecting Advanta's arguments that it was entitled to judgment as a matter of law with respect to two or all three of the bonuses. *See* Pet. App. 6a-7a.

case" was "a belief . . . that they could award Riseman a 1998 AMIP bonus payment in excess of the maximum apparently available . . . ." That argument proceeds as though only one bonus was at stake. If that were true, then the error reflected in an excessive award would indeed have been "easily quantified and addressed by the court of appeals." *Id.* at 8. Moreover, the resulting award would still have rested firmly on the original finding of liability, which the jury would have *had* to make in order to make any award at all. In this case, by contrast, the problem is that given the multiple bases for liability presented to the jury, there is no way for anyone to know exactly how it erred in arriving at its excessive award. That is why Advanta is entitled to a new trial. *Cf. Carter* v. *District of Columbia*, 795 F.2d 116, 134-35 (D.C. Cir. 1986) (R.B. Ginsburg and Bork, JJ.) (improper to reduce award without giving plaintiffs the option of a new trial where effect of error on award was "destined to remain unknown and unknowable, given the summary, opaque nature of the special verdict form" (footnote omitted)).

3. Respondent's effort to distinguish this Court's Seventh Amendment cases (Br. in Opp. 10-13) likewise depends entirely on his contention that in this case the effect of the jury's error on its damage award is "clearly ascertainable." *Id.* at 10 (quoting Pet. 6). For the reasons already stated, that contention is incorrect. Respondent's assertions to the contrary notwithstanding, this case *does* "involve error that undermines the integrity of the jury's verdict and damages award," and is distinctly different from "a case in which a jury finds full liability but awards damages in excess of a statutory limit." Br. in Opp. at 11. While it is true that "[a]ll" the court of appeals did was to "award the maximum damages possible given the evidence presented at trial" (*id.* at 13), in this case that approach required the court first to decide for itself that the jury must have intended to find liability under the WPCL on each of three distinct grounds. That approach "necessarily involved a reweighing of the evidence and reassessment of the appropriate amount of damages war-

ranted by the facts." *Id.* at 12-13 (quoting *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1351 (Fed. Cir.) (discussing *Hetzel* v. *Prince William County*, 523 U.S. 208 (1998) (per curiam)), *cert. denied*, 122 S. Ct. 580 (2001)). Such a judicial reweighing does not become permissible under the Seventh Amendment simply because it is a defendant's rights, rather than a plaintiff's, that are at stake. *Compare Hetzel*, 523 U.S. at 211 (citing *Dimick* for the proposition that "where a verdict is set aside . . . , *both* parties remain entitled to have a jury determine the issues of liability and the extent of injury" (emphasis added)).

Indeed, respondent does not appear to quarrel with our reading of the import of decisions such as *Hetzel*, *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), *Dimick*, and *Maryland* v. *Baldwin*, 112 U.S. 490 (1884). *Compare* Br. in Opp. 10-13 *with* Pet. 6-8. He argues only that those cases are inapposite, because here the error in awarding damages was "easily quantified," and left no doubt about the jury's findings on liability. *See* Br. in Opp. 11. Because the Court could properly evaluate and reject that argument on the basis of the papers already before it, we again respectfully suggest that the Court consider summary reversal. *Cf. Hetzel*, *supra*.

4. Respondent also suggests that the Court should deny review here because the decision below involves underlying claims based on state law; because the question presented is "inherently factbound" and of no importance to anyone but the parties; and because the decision is unpublished. *See* Br. in Opp. 1, 6, 14.

Respondent's references to state law are a distraction. Respondent nowhere contests that the Seventh Amendment right to a jury trial attached to the trial in federal court of respondents contract-based claims under the WPCL. *See* Pet. 5 n.3. How that right applied, or should have applied, in this case is purely a question of federal law. Ultimately, only this

Court can protect the Seventh Amendment rights of federal litigants.

The suggestions that this case is "factbound" or unimportant are equally meritless. The underlying facts are undisputed for present purposes, and are relevant only to the extent that—like the facts in any case—they serve to frame the legal question presented. In that regard, the facts here are elegantly simple. As the petition points out (at 5), they present this Court with a situation in which (i) the jury's damage award is demonstrably erroneous, but (ii) it is not possible to tell with certainty from the verdict how the jury erred, or what grounds of liability it actually found as the basis for its award. That conjunction of circumstances, clear from the opinion below, provides this Court with everything it needs to evaluate whether the court of appeals' judgment violated petitioner's Seventh Amendment rights. The answer to that question is potentially important to every litigant, and surely to every defendant, in every federal civil action.

Finally, the fact that the decision below is unpublished is more an indication of the need for guidance than a reason to deny review. The court of appeals' opinion, like respondent's brief in opposition, reflects a basic misunderstanding of the roles of judges and juries. That misunderstanding is not less profound, or less important, because it arises in a context—appellate remittitur of a damage award—that evidently *seemed* to the court of appeals so routine as not to call for publication. If a court of appeals decided that an employee suing his employer in federal court for an unpaid bonus did not have a right to a jury trial, the court's failure to publish its decision would not reduce the magnitude of its Seventh Amendment error. The decision below in this case had the same impact on Advanta's right to have a jury decide which of three bonuses respondent earned. The court of appeals' inattention to Advanta's constitutional right to a jury determination of liability on each bonus claim only underscores the need for this Court's intervention. Indeed, that is as true here as it was in *Hetzel*—in which the Court also re-

viewed, and summarily reversed, an unpublished decision that disregarded this Court's teachings concerning a federal litigant's Seventh Amendment rights. *See* 523 U.S. at 209-10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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